SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY, PETITIONER,

vs.

HARRY M. DURNING, COLLECTOR OF CUSTOMS AT THE PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CENTRAL VERMONT TRANSPORTATION COMPANY, Plaintiff-Appellee,

against

HARRY M. DURNING, Collector of Customs at the Port of New York, Defendant-Appellant

STATEMENT UNDER RULE 13

The above action was commenced on May 17, 1933, by the issuance of an order to show cause, signed by the Honorable Alfred C. Coxe, United States District Judge. The said order to show cause, together with the subpœna and bill of complaint, were served upon the defendant on May 18, 1933. The defendant thereafter moved to dismiss the bill of complaint for failure to state a cause of action and for want of equity. Argument was had before Honorable Frank J. Coleman, United States District Judge, on June 27, 1933. An order was entered pursuant to the opinion of the Court, on July 28, 1933, granting a preliminary injunction and denying the defendant's motion to dismiss. On August 8, 1933 this appeal was taken.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SUBPŒNA

The President of the United States to Harry M. Durning, Collector of Customs of the Port of New, York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a Bill of Complaint exhibited against you in the said Court in Equity, by Central Vermont Transportation

Company and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two hundred and fifty ($250) Dollars.

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, on the 15th day of May, in the year One thousand nine hundred and thirty-three and of the Independence of the United States the One hundred and fifty-seventh.

Charles Weiser, Clerk. (Seal.) Wallace R. Foster, Solicitor, 140 Nassau Street, N. Y. C.

The defendant is required to file his answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof, excluding the day of said service, otherwise the bill aforesaid may be taken Pro Confesso.

Charles Weiser, Clerk. (Seal.)

[fol. 3] In United States District Court for the Southern District of New York

In Equity

No. —

Central Vermont Transportation Company, Plaintiff,

against

Harry M. Durning, Collector of Customs of the Port of New York, Defendant

Bill of Complaint

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

The above-named plaintiff for its bill of complaint against the above-named defendant states:

I. That during all the times hereinafter mentioned, the plaintiff, Central Vermont Transportation Company, was

and still is a corporation duly organized and existing under and by virtue of the Laws of the State of Maine, with its principal office located at Portland in said State, and was and still is a common carrier of freight for hire, and was and still is a Citizen of said State of Maine, and its President and Managing Directors are citizens of the United States.

[fol. 4] II. That the defendant is the Collector of Customs of the Port of New York.

III. That this suit arises under the Constitution and Laws of the United States.

IV. That since the organization of the plaintiff in 1906 and continuously thereafter, all of the stock of said Central Vermont Transportation Company (except qualifying directors' shares) has been and still is owned by Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, both of which were corporations duly organized under the Laws of the State of Vermont; that from 1909 continuously to this date, substantially all the stock of Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, has been and still is owned by Canadian National Railway Company or its predecessor, Grand Trunk Railway Company of Canada.

V. That in 1909, plaintiff acquired and ever since has owned two certain steamships, the "New London" and the "New York" which were built in the United States and were then and still are duly enrolled and documented under the Laws of the United States, with Portland, Maine, as their home port; that said steamships have ever since been and now are operated by plaintiff exclusively as common carriers of freight between New London, Connecticut, and New York, New York, in conjunction with the Central Vermont Railway Route.

[fol. 5] VI. That said steamships are constructed for operation on Long Island Sound and are only suitable for such waters; that said steamships were designed particularly for the carriage of freight in connection with a railroad operation.

VII. That ever since 1909, the plaintiff and Central Vermont Railway, Inc., or its predecessor, Central Vermont

Railway Company, as common carriers, have been and still are engaged in the transportation of property partly by railroad and partly by water under a common control, management and arrangement for a continuous carriage or shipment between New York City and points in the States of Connecticut, Massachusetts and Vermont, by rail and by water; and by common arrangement between themselves and the Canadian National Railway Company or its predecessor, Grand Trunk Railway Company of Canada, have constituted and still constitute a through route over which property is transported between New York City and New England points in the East, and Chicago and other points in the West in Westward and Eastward movement, that said plaintiff and said Central Vermont Railway, Inc., and also the property transported by them have been and still are under the jurisdiction of the Interstate Commerce Commission and subject to the determination and control by said Commission of the terms and conditions under which said plaintiff and said Central Vermont Railway, Inc., are operated in the handling of their traffic, and said Commission has approved of or established maximum joint rates between and over said rail and water route.

[fol. 6] VIII. That all merchandise transported by the plaintiff is transported by it between points in the continental United States over a through route recognized by the Interstate Commerce Commission for which rate tariffs have been filed with said Commission and said through route is in part over Canadian rail lines and plaintiff's connecting water facilities.

IX. That plaintiff has duly filed tariffs and concurrences in its own name with said Interstate Commerce Commission and otherwise has duly complied with the Act to Regulate Commerce.

X. That upon the passage of the Panama Canal Act (paragraphs 9-12, Section 5 of the Act to Regulate Commerce) Central Vermont Railway Company, the predecessor of Central Vermont Railway, Inc., made application to the Interstate Commerce Commission for authority to own the stock of the plaintiff and to operate in connection with plaintiff's steamships, and upon said application to the Interstate Commerce Commission, said Central Vermont Railway Company made full disclosure to the Interstate

Commerce Commission that all of its stock was owned by Grand Trunk Railway Company of Canada, and the ownership of said stock and the operation of the plaintiff by said Central Vermont Railway Company was approved by the Commission and declared to be in the public interest.

XI. That during the year, 1930, Central Vermont Railway, Inc., made application to the Interstate Commerce Commission to acquire and operate properties formerly [fol. 7] owned by Central Vermont Railway Company and duly made special application to own the stock of Central Vermont Transportation Company and to transport property in connection with the steamships, "New York" and "New London" as part of its railroad operation; that at the same time, Canadian National Railway Company made application to the Interstate Commerce Commission to acquire and own the stock of Central Vermont Railway, Inc., and both such applications were approved and declared to be in the public interest.

XII. That all freight transported on said steamships "New York" and "New London" is railroad freight moving on through bills-of-lading issued at New York by plaintiff in case of Westbound freight or at railroad points of origin to New York in case of Eastbound freight; that all such bills-of-lading on such freight are issued in accordance with the Act to Regulate Commerce and the Bill-of-Lading Act.

XIII. That neither of said steamships receives nor carries any merchandise between New York and New London, Connecticut, but only such merchandise as is destined to or received from inland railroad points; and the amount of merchandise carried between New York and New England railroad points constitutes about one-third of the merchandise transported upon said ships.

XIV. That plaintiff is an insurer of the merchandise transported upon its steamships and is responsible for the safe carriage and delivery to the consignee or owner thereof.

[fol. 8] XV. That on or about the 9th day of May, 1933, Central Vermont Railway, Inc., received at its station in St. Albans, Vermont, a box of merchandise consigned to Henry Allen, New York, New York; that while said box

of merchandise was in transit and in the possession of the plaintiff and was moving over said through route under and pursuant to the authority of the Interstate Commerce Commission and upon a proper through bill-of-lading, said box of merchandise was wrongfully and unlawfully seized and retained by the defendant claiming to act by some authority vested in him as Collector of Customs of the Port of New York, and he wrongfully threatens to cause the same to be forfeited under some claimed law of the United States to the loss and damage of plaintiff to the value thereof; that in disregard of plaintiff's rights, defendant threatens and intends to seize and forfeit all merchandise transported by the plaintiff which is shipped between New York and New England points, and unless enjoined by this Court from so doing will do plaintiff irreparable damage, subject it to a multitude of suits in order to protect its rights, with the result that the value of plaintiff's business and the profitable use of its property will be totally destroyed and plaintiff will suffer injury which cannot be compensated in damages.

And plaintiff prays that upon the final hearing of this cause, it be ordered and decreed that the defendant surrender to plaintiff said seized box of merchandise, and defendant, his agents, servants and employees be enjoined and restrained from interfering with the plaintiff's busi-
[fol. 9] ness or the merchandise or property transported by it, and for such other general relief as may to the Court be deemed just and equitable.

Wallace R. Foster, Solicitor for Plaintiff, Office & Post Office Address: 140 Nassau Street, New York City, N. Y.

Duly sworn to by E. Deschenes. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon the subpœna and bill of complaint herein and the annexed affidavit of Horace H. Powers, verified the 13th

day of May, 1933, and after hearing Wallace R. Foster, Esq., solicitor for the plaintiff, and Ira Koenig, Esq., solicitor for the defendant.

Let the defendant show cause at a Stated Term for motions to be held in Court Room No. 235, in the Old Post-Office Building, Borough of Manhattan, New York, on the 23rd day of May, 1933, at 10:30 A. M., or as soon thereafter as counsel can be heard why an injunction should not be issued enjoining and restraining the defendant, his agents, servants and employees from interfering with plaintiff's business or the merchandise transported by it on the ground that the defendant, his agents, servants or em-
[fol. 11] ployees have no jurisdiction over or lawful right to interfere with the plaintiff's business or the merchandise or the property transported by it, and sufficient reason appearing therefor, it is

Ordered that service of a copy of this order and the papers upon which it is granted on the defendant's attorney on or before the 18th day of May, 1933, shall be deemed sufficient service, and it is

Further ordered that the defendant, his agents, servants and employees be, and they hereby are enjoined and restrained from further interfering with plaintiff's business or the merchandise or property transported by it until the further order of this Court.

Dated May 17th, 1933.

Alfred C. Coxe, United States District Judge.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HORACE H. POWERS

STATE OF VERMONT,
County of Franklin, ss:

Horace H. Powers, being duly sworn, deposes and says that he resides at St. Albans, Vermont, and is a Director of and General Attorney for the above-named Central Vermont Transportation Company which is a common carrier of freight and was incorporated under the laws of Maine on November 12, 1908. It was conceived and caused to be

incorporated by Central Vermont Railway Company so as to accomplish an extension of its rail line, across Long Island Sound, from New London, Connecticut to New York City, and has never been otherwise operated. The stock of the Central Vermont Transportation Company was all purchased by Central Vermont Railway Company, the predecessor of Central Vermont Railway, Inc. At that time, [fol. 13] substantially all of the stock of Central Vermont Railway Company was owned by Grand Trunk Railway Company of Canada, the predecessor of Canadian National Railway Company.

The boats "New London" and "New York" were built in the United States and were enrolled and documented under the laws of the United States. These boats were acquired by Central Vermont Transportation Company in 1909. These boats were constructed and are only suitable for operation on Long Island Sound. These boats are designed, and are only suitable for the carriage of freight in connection with a railroad operation.

These boats, "New London" and "New York," have been in continuous operation from 1909 to date, from New London to New York, as a part of the Central Vermont Railway route. These boats have been owned by Central Vermont Transportation Company, a Maine Corporation, continuously from 1909 to date. The stock of Central Vermont Transportation Company has all been owned (except qualifying directors' shares) continuously from 1909 to date by Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, both of whom are American corporations. Substantially all of the stock of Central Vermont Railway, Inc., and its predecessor, Central Vermont Railway Company, in turn, has been owned (except qualifying directors' shares) continuously from 1909 to date by Canadian National Railway Company, or its predecessor, Grand Trunk Railway Company of Canada, both of whom are Canadian corporations.

[fol. 14] These two boats, "New London" and "New York," handle no traffic except (1) common carrier freight traffic destined to or received from points on Central Vermont Railway and (2) common carrier freight traffic destined to or received from points beyond Central Vermont Railway transported by that railroad. Nor has Central Vermont Transportation Company ever owned or operated any boats except to carry such traffic as a part of a

railroad operation. Central Vermont Transportation Company files tariffs and concurrences in its own name with the Interstate Commerce Commission and otherwise has complied with the Act to Regulate Commerce. Approximately 33 per cent of all freight transported in these boats is received from or destined to points on the line of Central Vermont Railway.

Upon the passage of the Panama Canal Act, (paragraphs 9-11 of Section 5 of the Act to Regulate Commerce) Central Vermont Railway Company, the predecessor of Central Vermont Railway, Inc., made application to the Interstate Commerce Commission for authority to own the stock of Central Vermont Transportation Company and to operate in connection with said boats. A full disclosure was made to the Interstate Commerce Commission that substantially all of the stock of Central Vermont Railway Company was owned by Grand Trunk Railway Company of Canada. The stock ownership and operation of Central Vermont Transportation Company by Central Vermont Railway Company was approved and declared to be in the public interest.

40 I. C. C., 589.

[fol. 15] Subsequently and in 1930, Central Vermont Railway, Inc., made application to the Interstate Commerce Commission to acquire and operate the properties formerly owned by Central Vermont Railway Company. Central Vermont Railway, Inc., made special application to own the stock of Central Vermont Transportation Company and to transport freight in connection with the boats "New London" and "New York" and as a part of the railroad operation. At the same time Canadian National Railway Company made application to the Interstate Commerce Commission to own the stock of applicant, Central Vermont Railway, Inc. Both applications were approved and declared to be in the public interest.

158 I. C. C., 397.

The fact is, and the Interstate Commerce Commission has so found, that Central Vermont Transportation Company is but a "bridge" to carry Central Vermont Railway freight between New London and New York.

All freight handled on the boats "New London" and "New York" is railroad freight moving on through bills-

of-lading issued at New York in case of Westbound freight or at points of origin to New York in case of Eastbound freight. The bills-of-lading are issued on such freight in accordance with the Act to Regulate Commerce and the Bill-of-Lading Act.

The President and Managing Directors of Central Vermont Transportation Company are citizens of the United States and the corporation is organized under the laws of [fol. 16] that country. The two boats "New London" and "New York" were built in the United States and are properly enrolled and licensed under the laws of the United States and have their home port at Portland, Maine.

Since 1909 continuously to date, Central Vermont Transportation Company and Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, have been and now are engaged in the transportation of property partly by railroad and partly by water under a common control, management and arrangement for a continuous carriage or shipment between New York City and points in the States of Connecticut, Massachusetts and Vermont, by rail and by water; and by common arrangement between themselves and Canadian National Railway Company or its predecessor, Grand Trunk Railway Company of Canada, have constituted and still constitute a through route over which property is transported between New York City and New England points in the East and Chicago and other points in the West, in Westward and Eastward movement.

All merchandise transported in the boats "New London" and "New York" between points in the continental United States is transported over or upon a through route recognized by the Interstate Commerce Commission and for which rate tariffs have been filed with said Commission, and said through route is in part over Canadian rail lines and the Connecting water facilities of Central Vermont Transportation Company. St. Albans, Vermont, is a Central [fol. 17] Vermont Railway point on the through route described in this and the next preceding paragraph. The merchandise involved in this proceeding moved by railroad from St. Albans, Vermont over the Central Vermont Railway, Inc., to New London, Connecticut; thence over the line of Central Vermont Transportation Company in one of its boats, the "New York" or the "New London" to New York City, which transportation from St. Albans to New York

is on the through route described in this and the next preceding paragraph.

That on or about the 9th day of May, 1933, Central Vermont Railway, Inc., received at its station in St. Albans, Vermont, a box of merchandise consigned to Henry Allen, New York, New York; that while said box of merchandise was in transit and in the possession of the plaintiff and was moving over said through route under and pursuant to the authority of the Interstate Commerce Commission and upon a proper through bill-of-lading, said box of merchandise was wrongfully and unlawfully seized and retained by the defendant claiming to act by some authority vested in him as Collector of Customs of the Port of New York, and he wrongfully threatens to cause the same to be forfeited under some claimed law of the United States to the loss and damage of plaintiff to the value thereof; that in disregard of plaintiff's rights, defendant threatens and intends to seize and forfeit all merchandise transported by the plaintiff which is shipped between New York and New England points, and unless enjoined by this Court from so doing will do plaintiff irreparable damage, subject it to a [fol. 18] multitude of suits in order to protect its rights, with the result that the value of plaintiff's business and the profitable use of its property will be totally destroyed and plaintiff will suffer injury which cannot be compensated in damages.

That plaintiff has commenced this action against the defendant in this Court for an injunction restraining the defendant, his agents, servants and employees from interfering with the plaintiff's business or the merchandise or property transported by it; that deponent, as attorney and director of plaintiff, is thoroughly familiar with the facts and circumstances regarding the business and operations of the plaintiff and of the matters alleged in its bill of complaint and verily believes that plaintiff has a good cause of action upon the merits; that this application is made for an order requiring the defendant to show cause why a preliminary injunction should not be granted containing a stay prohibiting the defendant from interfering with plaintiff's business until the hearing and determination of plaintiff's application for a temporary injunction in order to prevent defendant from destroying the business and value of plaintiff's property.

Horace H. Powers.

Sworn to before me, this 13th day of May, 1933. J. B. Wood, Notary Public. My comm. expires Feb. 10, 1935. (Seal.)

(County Clerk Certificate.)

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HARRY M. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK

Harry M. Durning, being duly sworn, deposes and says:

I am the Collector of Customs for the Port of New York and am named as the defendant in the above entitled suit in equity.

On May 12th last a Customs Inspector connected with my office made a seizure of one crate containing a water heater, consigned to H. M. Allen, notify J. M. Adams, at Pier 29, East River. This shipment originated at St. Albans, Vermont, and the package is now being held in the Government's seizure room. The seizure was made from my office at the direction of the Attorney General of the United States and the Secretary of Commerce. Thereafter, this bill in equity was filed to enjoin this and further seizures of merchandise carried over the complainant's route.

The Central Vermont Transportation Co. operates two boats between the Ports of New London, Conn., and New [fol. 20] York City, and it is contended that this operation is illegal and in violation of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883).

I had been informed that although the Department of Commerce was aware of the use of these boats in the transportation of merchandise in interstate commerce it was only recently that it came to its attention that the stock of the complainant was not 75% American owned, as required by Sections 27, 37 and 38 of the Merchant Marine Act of 1920 (46 U. S. C. 888, 802).

It is not disputed that the stock of the complainant, a domestic corporation, was wholly owned by the Central

Vermont Railway, Inc., also a domestic corporation whose stock in turn is owned by the Canadian National Railways, Inc., a Canadian corporation.

The facts contained in the moving papers and the bill of complaint are conceded for the purpose of this argument, but it is pointed out to the Court that the concessions so made do not carry over to conclusions and argumentative deductions therefrom.

The only fact which I deem pertinent in this proceeding is that merchandise is being transported between points in the United States on vessels not owned by United States citizens, as required by the provisions of Section 27 of the Merchant Marine Act. This foregoing statement is conceded to be accurate by the complainant but it is contended only that as a matter of law the particular provision heretofore referred to does not include within its terms its operations.

[fol. 21] The facts are not in dispute, and I have been informed by the United States Attorney for the Southern District of New York, my counsel, that the seizure made by me was proper and it is therefore respectfully submitted that the motion for preliminary injunction be denied and the bill in equity be dismissed for failure to state a cause of action.

(Sgd.) Harry M. Durning.

Sworn to before me, this 26th day of June, 1933.

———.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIR: Please take notice that upon the bill of complaint herein and upon all the proceedings and pleadings hereto-

[fol. 22] fore had herein, the undersigned will move this Court at a stated term thereof for motions to be held in Room 235, United States Courts and Old Post Office Building, Borough of Manhattan, City of New York, on the 20th day of June, 1933, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for

an order dismissing the bill of complaint herein on the ground that it does not state facts sufficient to constitute a cause of action and for lack of equity, and for such other and further relief as to the Court may seem just and proper.

Dated New York, N. Y., June —, 1933.

Yours, etc., George Medalie, United States Attorney for the Southern District of New York, Attorney for Defendant Harry M. Durning, Collector of Customs at the Port of New York, Office and Post Office Address: U. S. Courts and Old P. O. Bldg., Borough of Manhattan, City of New York.

To Wallace R. Foster, Esq., Solicitor for the Plaintiff, 140 Nassau Street, New York, N. Y.

[fol. 23] In United States District Court, Southern District of New York

In Equity

Nos. 76-38

Central Vermont Transportation Company, Plaintiff,

against

Harry M. Durning, Collector of Customs at the Port of New York, Defendant

In Equity. Motion for preliminary injunction to restrain defendant from seizing and causing to be forfeited merchandise transported on the plaintiff's boats from New London, Conn., to New York City; and cross motion to dismiss complaint for insufficiency.

Wallace R. Foster (Horace H. Powers of Counsel), Attorney for Plaintiff.

George Z. Medalie (Ira Koenig of Counsel), United States Attorney.

OPINION

F. J. COLEMAN, J.:

Memorandum

The principal question presented is the proper construction of the proviso of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883). That section in so far as [fol. 24] applicable reads as follows:

"*Transportation of merchandise between points in United States in other than domestic built and documented vessels.* No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by Sections 13 or 808; *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities. * * *"

The plaintiff owns and operates two freight steamers between New London, Conn., and New York City and the defendant as collector of Customs at the latter port has seiezd one shipment of merchandise under the above statute and threatens to continue to do so. All the facts are undis-[fol. 25] puted and a pure question of law is presented as to his right and authority. Though the plaintiff is a Maine Corporation, it is deemed to be not an American citizen within the meaning of the Statute because of the ownership of its stock; so that the fact that the boats were built and documented under the laws of the United States does not invalidate the seizure of the merchandise transported on them if the proviso of the statute is inapplicable.

The Interstate Commerce Commission has taken some jurisdiction over the plaintiff and the routes involved. The Central Vermont Railway, Inc., owns and operates a railroad from Canada to New London, Conn., and with the approval and consent of the Commission it owns all the stock of the plaintiff (except directors' qualifying shares) which owns and operates the boats in question. All of the stock of the Central Vermont Railway, Inc., is in turn owned by the Canadian National Railway Company with the consent and approval of the Commission. In that system the boats in question perform merely the function of a "bridge" between the New London terminus and New York City. They carry no freight other than what has been transported over the Central Vermont Railroad or what is destined for such transportation, all under through bills of lading issued in accordance with Governmental regulations. The Commission has recognized the various routes over which such transportation is conducted and tariff schedules have been duly filed for all of them. All of the merchandise carried by the boats has been or is destined to be transported over [fol. 26] such recognized routes; as to about ⅓ of the merchandise, the routes lie entirely within the United States, but as to the other ⅔, the routes lie partially through Canada.

The Government contends that if the route lies entirely within the United States the merchandise is forfeitable under the statute quoted; but that where the route is partially in Canada the proviso is applicable. The system has been operated as above described since 1909 and though thirteen years have elapsed since the passage of the statute the question is now raised for the first time as to the plaintiff's right to continue what the Interstate Commerce Commission has approved. The merchandise seized by the defendant was shipped from St. Albans, Vermont, consigned to a person in New York City and the defendant threatens to seize all other merchandise shipped from New England States over this route though it is conceded that if it had been shipped from Chicago or some other point within the United States so located that the transportation would be partially through Canada, the proviso would be given protection.

In construing the statute, it should be recognized that its fundamental purpose is to protect American shipping.

It creates quite a strain on the imagination to think of these two boats as foreign, but they may be assumed to be so. The statute concededly authorizes them to carry freight which has been shipped over the system from some point in the United States provided the route lay in part in Canada. It is a little difficult to see why Congress should have [fol. 27] sought to protect American shipping by forbidding these boats to carry goods which had also been shipped from a point within the United States but over a route which did not enter Canada. What possible connection is there between the incidental passing through a part of Canada and the protection of American shipping? It was the general intention of Congress to withhold the protection to American shipping where foreign owned boats were carrying merchandise over a part of a through route recognized by the Interstate Commerce Commission; in other words, Congress apparently desired not to interfere with operations which had been approved by its chosen instrument of supervision. The operation which the Government after thirteen years claims to be illegal has beeen approved by the Interstate Commerce Commission in so far as it had jurisdiction; and all the merchandise is transported over through routes to and from New York City which the Commission have recognized and for which tariffs have been duly filed; and the relations between the plaintiff, the Vermont Central Railway, Inc., and the Canadian National Railway Company have been approved by the Commission. To hold that the plaintiff must discontinue part of that business because the merchandise did not pass through a part of Canada would be contrary to the general intention of Congress and should not be done unless the words used in the proviso compel it. The effect would be to deprive the New England States of transportation facilities which are afforded to the Middle Western places in the United States merely because en route the merchandise does not enter Canada.

[fol. 28] It seems to me that the apparent purpose of Congress can be accomplished by construing the words, "over through routes recognized by the Interstate Commerce Commission" as not requiring transportation over the entire route. St. Albans, Vermont, and all the other points from which shipments are claimed to be unauthorized, are on through routes which "are in part over

Canadian Rail Lines"; and shipments from those points are "over" such routes though the entire route is not traversed.

For these reasons it seems to me that a preliminary injunction should issue to prevent interference with a practice of such long standing until a final determination.

It is appropriate that the Court should expressly recognize the exceptionally helpful briefs submitted by counsel for both sides. In their clarity of thought, comprehensiveness of research and fairness of statement of the law, counsel have earned the appreciation of the Court.

Motion to dismiss complaint is denied and motion for preliminary injunction granted. Settle orders on notice.

——, U. S. D. J.

July 24, 1933.

[fol. 29] IN UNITED STATES DISTRICT COURT

In Equity

Nos. 76-38

Present: Hon. Frank J. Coleman, United States District Judge.

CENTRAL VERMONT TRANSPORTATION COMPANY, Plaintiff,

against

HARRY M. DURNING, Collector of Customs at the Port of New York, Defendant

ORDER GRANTING PRELIMINARY INJUNCTION—July 28, 1933

The plaintiff in the above entitled action, having moved this Court for a preliminary injunction and the defendant having moved for an order dismissing the bill of complaint on the ground that the facts therein stated are insufficient to constitute a cause of action, and for lack of equity, and after reading the plaintiff's order to show cause, dated May 17th, 1933, the bill of complaint, subpœna, affidavit of Horace H. Powers verified the 13th day of May, 1933; the defendant's notice of motion dated June 6th, 1933, and

[fol. 30] the affidavit of Harry N. Durning, verified the 26th day of June, 1933, and both motions having come on to be heard at a stated term for motions in this Court, on the 27th day of June, 1933, and after hearing Wallace R. Foster, Esq., attorney for plaintiff, and Horace H. Powers, Esq., of counsel, in favor of the motion for the injunction and in opposition to the motion to dismiss the complaint, and George Z. Medalie, United States Attorney for the Southern District of New York, by Ira Koenig, Esq., Assistant United States Attorney, of counsel, attorney for the defendant in opposition to plaintiff's motion for the injunction and in favor of defendant's motion to dismiss the bill of complaint, and, after due deliberation, it is, on motion of Wallace R. Foster, Esq., attorney for plaintiff,

Adjudged, ordered and decreed, for reasons stated in writing and made a part of the record, that the injunction be issued as prayed in the bill of complaint and remain in force until the further order of the Court, and it is

Further ordered, that the motion made by defendant to dismiss the bill of complaint herein on the ground that the facts therein stated are insufficient to constitute a cause of action and for lack of equity, be and the same is in all respects denied.

Frank J. Coleman, United States District Judge.

[fol. 31] In United States District Court, Southern District of New York

[Title omitted]

Petition and Allowance of Appeal

The above named Harry M. Durning, Collector of Customs of the Port of New York, feels himself aggrieved by the order entered in this case on July 28, 1933, whereby he appeals from said order to the Circuit Court of Appeals for the Second Circuit.

And the said defendant accordingly prays that the said appeal be allowed.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for the Defendant.

On the foregoing notice of appeal and petition for the allowance thereof, it is

Ordered that the appeal prayed for by the defendant Harry M. Durning be and the same hereby is allowed.

Robert P. Patterson, United States District Judge.

Dated New York, August 8th, 1933.

[fol. 32] In United States District Court

[Title omitted]

Assignments of Error

Now comes Harry M. Durning, Collector of Customs of the Port of New York, and makes and files his assignment of errors.

1. The District Court erred in granting the application of the plaintiff for a preliminary injunction.

2. The District Court erred in denying the motion of the defendant to dismiss the bill of complaint for insufficiency and want of equity.

3. The District Court erred in holding that the transportation of merchandise from St. Albans, Vermont, to New York City over ships owned by the Central Vermont Transportation Company, was within the proviso contained in Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883).

[fols. 33 & 34] Wherefore, defendant prays that the order of the District Court be reversed and the motion of the defendant to dismiss the bill in equity be granted.

Yours, etc., George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for the Defendant.

Citation, in usual form, omitted in printing.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. Dated October 3rd, 1933.

Wallace R. Foster, Attorney for Plaintiff. George Z. Medalie, United States Attorney, Attorney for Defendant.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CENTRAL VERMONT TRANSPORTATION COMPANY, Complainant-Appellee,

against

HARRY M. DURNING, Collector of Customs of the Port of New York, Defendant-Appellant

Appeal from United States District Court for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From an order granting a temporary injunction restraining the defendant-collector from seizing and forfeiting under Section 27 of the Merchant Marine Act of 1920 certain merchandise transported by the complainant, and denying a motion to dismiss the bill of complaint, the defendant appeals. Modified.

Martin Conboy, United States Attorney, for defendant-appellant; Samuel C. Coleman and Edward J. Ennis, Assistant United States Attorneys, of counsel.

Wallace R. Foster, Solicitor for Complainant-appellee; Horace H. Powers, of counsel.

[fol. 38] AUGUSTUS N. HAND, Circuit Judge:

This appeal is by the defendant, Collector of Customs of the Port of New York, from an order which denied a motion to dismiss the bill of complaint and restrained him from seizing and forfeiting certain merchandise shipped on the Central Vermont Railway, Inc., at St. Albans, Vermont, consigned to one Allen, at New York City, under a through bill of lading.

So far as the order appealed from denied the motion to dismiss the bill it is not now subject to review because it is not final and the cause is still open for trial on the pleadings. We shall, therefore, review only the portion of the order which granted an injunction pendente lite.

The Complainant Central Vermont Transportation Company was incorporated under the laws of Maine in 1908, and its stock, except certain directors' qualifying shares, was owned by the Central Vermont Railway Company, the stock of which was in turn owned by the Grand Trunk Railway Company, a Canadian corporation. In 1909, the complainant purchased two vessels, The New York and The New London, built in the United States and documented under the laws of the United States, and has continuously operated them between New London and New York. In 1923, the Canadian National Railway Company, also a Canadian corporation, acquired the Grand Trunk Railway Company. In 1929, the Central Vermont Railway, Inc., acquired the property of the Central Vermont Railway Company, and the Canadian National Railway Company acquired all the stock except directors' qualifying shares of the Central Vermont Railway, Inc. Central Vermont Transportation Company and Central Vermont Railway, [fol. 39] Inc., are engaged in transportation of property partly by railroad and partly by water under common control for a continuous carriage between points in the States of Connecticut, Massachusetts and Vermont and New York City and return by rail and by water. It also transports merchandise originating at points in the western States which is routed over Canadian rail lines and thence over the Central Vermont and its connecting water carrier. All the merchandise transported in the boats New London and New York between points in the United States is transported over the whole or a part of a through route recognized by the Interstate Commerce Commission for which route tariffs have been filed with the Commission and such through route is in part over Canadian rail lines.

The merchandise involved in this proceeding moved by railroad from St. Albans, Vermont, over the Central Vermont Railway, Inc., to New London, Connecticut, thence over the Central Vermont Transportation Company in one of its boats, the New York or the New London, to New York City, which transportation from St. Albans to New York is on a part of the through route herein described. While the merchandise was in the possession of the complainant under a through bill of lading it was seized by the defendant as Collector of Customs for forfeiture under

Section 27 of the Merchant Marine Act of June 5, 1920. That Act provides as follows:

"No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a ves- [fol. 40] sel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 13 or 808: Provided, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities * * *." (U. S. Code Title 46, §883.)

The steamboats, New York and New London, are not owned by citizens of the United States. This fact is evident from the definition of Section 38 of the Merchant Marine Act of 1920 which says that no corporation

"shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States"

and that

"the controlling interest shall not be deemed to be owned by citizens of the United States (a) if the title is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States * * *".

The Central Vermont Railway, Inc., an American corporation, owns the stock of the Central Vermont Transportation Company, but in turn is owned by the Canadian National Railway Company, a Canadian corporation, so that the Transportation Company is not a citizen within the

meaning of Section 38 because, under that statute, inter-
[fol. 41] vening holding companies make no difference and ultimate beneficial ownership controls. Such ownership is Canadian.

St. Albans, Vermont, where the freight was shipped, is on a through route from western points in the United States to New York, which is in part over Canadian rail lines and their water carriers, and is recognized by the Interstate Commerce Commission as such. The Central Vermont Transportation Company filed tariffs with the Commission in its own name.

Approximately thirty-three per cent of all freight transported in its steamboats is received from or destined to points in New England on the line of the Central Vermont Railway. The remainder comes from interior points in the west through Canada and thence over the lines of the Central Vermont Railway, Inc., to the boats of the Central Vermont Transportation Company. The Transportation Company has never employed its boats to carry traffic except as a part of a railroad operation.

Upon the passage of the Panama Canal Act (Section 5, Paragraphs 9-11 of the Act to regulate commerce) the Central Vermont Railway Company applied to the Interstate Commerce Commission for authority to own the stock of the Transportation Company and disclosed that substantially all its stock belonged to the Grand Trunk Railway Company. Subsequently, in 1930, the Central Vermont Railway, Inc., made a similar application and the Canadian National Railway made application for leave to own the stock of Central Vermont Railway, Inc. Each of these applications was approved and declared to be in the
[fol. 42] public interest.

The District Court held that the shipment in question came within the proviso of Section 27 of the Merchant Marine Act of June 5, 1920, and granted an injunction pendente lite accordingly. With this conclusion we cannot agree.

It is argued by the complainant that Section 27 of the Merchant Marine Act does not apply to it or to the merchandise it transports because of the paramount jurisdiction of the Interstate Commerce Commission. This argument is sought to be enforced by the language of Section 33 of the Shipping Act of September 7, 1916, which reads:

"* * * this Act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the board concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission; nor shall this Act be construed to apply to intrastate commerce." 39 Stat. L. 732.

Section 1, paragraph (1) (a) of the Interstate Commerce Act (41 Stat. L. 474) provides that such Act shall apply to:

"The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment."

Section 6, (13), (37 Stat. L. 568), provides that:

"When property may be or is transported from point to point in the United States by rail and water * * * the transportation being by a common carrier or carriers, and [fol. 43] not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, * * *"

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

We can see no reason for supposing that the jurisdiction given the Interstate Commerce Commission "to establish through routes and maximum joint rates between and over such rail and water lines" is in any way in conflict with the later statutory requirements of Section 27 of the Merchant Marine Act. The provisions are entirely compatible, relate to different matters, and may, without difficulty, be read together. The Interstate Commerce Act undoubtedly gives authority to the Commission to establish through routes and joint rates and, under Section 5, (11), (37 Stat. L. 566), to permit water carriers belonging to railroads, if operated in the interest of the public, to continue such operation under common ownership, though otherwise competing. But this jurisdiction does not affect carriage pre-

hibited by Section 27 of the Merchant Marine Act. Indeed, it is difficult to comprehend the force of the argument that the latter section is not applicable.

The complainant particularly insists that Section 27 is not applicable because of the terms of the Proviso. We have [fol. 44] demonstrated that the vessels involved in the case are not "owned by persons who are citizens of the United States" within the meaning of the Act. It remains to determine whether, in spite of this, the Proviso covers the situation here.

The Proviso by its express terms only excepts "merchandise transported between points within the continental United States * * * over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities * * *".

The complainant attempts to claim exemption under this proviso upon the theory that "over through routes" means "over" any part of such routes. This does violence to the language and defeats the purpose of the proviso as well.

The enacting clause of Section 27 expresses a very old governmental policy. Chapter 2, Section 5, (1 Stat. L. 24, 27) of the Act of July 4, 1789, of the First Congress preferred vessels owned by our own citizens by allowing a discount on duties paid for goods imported in such vessels. Chapter 31, Section 4, of the Act of March 1, 1817, (3 Stat. L. 351) prohibited importation of merchandise from one port of the United States to another such port in "a vessel belonging wholly or in part to a subject of any foreign power" under pain of forfeiture. Chapter 201, Section 20, of the Act of July 8, 1866, (14 Stat. L. 182) aimed to prevent evasion of duties along the Canadian border, provided that merchandise carried from any port of our northern, northeastern or northwestern frontiers in a foreign vessel to a foreign port and then reshipped to any other port of [fol. 45] the United States on such frontiers in order to evade Section 4 of the Act of 1817, should be subject to forfeiture. This legislation was ameliorated by Chapter 213, Section 4 of the Act of March 1, 1873, (17 Stat. L. 463) so far as to permit subjects of Great Britain, without payment of duty, to carry merchandise in British vessels from one

place in the United States to another upon the St. Lawrence River, the Great Lakes and the rivers connecting the same, provided part of such transportation was through the Dominion of Canada by land carriage and in bond (R. S. § 4347). This local exemption in pursuance of the Treaty with Great Britain of May 8, 1871, (17 Stat. L. 873 was repealed March 3, 1883, (22 Stat. L. 641) upon the expiration of the Treaty. Our legislative policy continued without amelioration and indeed was stiffened by Chapter 117 of the Act of February 15, 1893, (27 Stat. L. 455) which forbade shipments in foreign vessels from one port of the United States to another via a foreign port and by Chapter 26 of the Act of February 17, 1898 (30 Stat. L. 248) which forbade shipments in foreign owned vessels from one United States port to another "either directly or via a foreign port or for any part of the voyage." As these provisions were thought not to cover transportation that was partly by water and partly by land (30 Opinions Atty. Gen. 3), the law was extended under Section 27 of the Merchant Marine Act by adding the words "or by land and water" to existing provisions so as wholly to reserve coastwise trade for citizens of the United States. The bill as originally introduced did not contain the Proviso and was calculated to disturb established routes between the northwest and the east through the Lake ports over water con-
[fol. 46] nections of Canadian rails to and from the eastern markets.

The nature of the problem is shown by the decision of the Interstate Commerce Commission in Rail-Lake-and-Rail Rates Between United States Points via Canadian Lines, 96 I. C. C. 633 (1925). There an attempt was made to suspend through rates established over Canadian routes, but the Commission held that American owned water routes such as from Duluth to Buffalo and then over American rails to eastern points in the United States were insufficient to handle all the traffic and that it was advantageous to our trade to move from Duluth to Sarnia, Ontario, and from Chicago and Milwaukee to Depot Harbor, and then by Canadian and American rails to eastern points. These foreign water routes through the Great Lakes, when recognized by the Commission, were intended to be exempted from Section 27, and the bill, as first introduced, was amended by adding the Proviso in order to exempt merchandise using these Canadian rail and connecting water routes.

It is evident that an interpretation of the Proviso that would permit carriage in foreign owned vessels over any part of a through route would defeat the long established policy of Congress. The Proviso clearly related only to shipments over (and not merely on some part of) through routes and actually over a Canadian rail line. The single exception to our national policy allowed by Section 27 and intended only to affect routes along the Great Lakes and the St. Lawrence River, if extended in the manner complainant desires would enable foreign owned vessels to carry merchandise on any of our own waters by the simple expedient of filing tariffs showing participation in routes [fol. 47] exempted by the proviso.

While we regret the result we are forced to reach, we feel convinced that the merchandise here did not move over a through route that was "in part over Canadian rail lines and their own or other connecting water facilities" but, on the contrary, moved over a route that began in Vermont and ended in New York with no intervening Canadian rail lines at all. The provincial policy which prevents shipments made in New England from being carried on complainant's steamers is something we may deplore but cannot control. The exclusion of such freight from transportation is doubtless an inconvenience to many American customers of Central Vermont Railway, Inc., and a disturbance of a course of traffic that has been of long standing, but Section 27 of the Merchant Marine Act seems to us clear and peremptory, and, on the face of the papers submitted on the motion for an injunction, the merchandise in question is subject to forfeiture.

Finally it is argued that the construction we have placed on Section 27 violates the Fifth Amendment of the Constitution. We can see no basis for this contention. The transportation we are dealing with would always have been illegal but for the fact that the complainant was an American corporation and, prior to the enactment of Section 38 of the Merchant Marine Act, control of its stock by a Canadian company would not have made the "New York" and "New London" foreign owned vessels. We cannot believe that statutory recognition that the beneficial ownership was in a Canadian corporation and that the steamboats were thereby foreign owned and thus within the prohibition of Section 27 was beyond the powers of Congress. It did

[fol. 48] not involve the taking of the property of the complainant for the latter was at liberty to sell its vessels at any time. Moreover, the Canadian National Railway Company could dispose of the stock of the Central Vermont Transportation Company if its steamboats could not be operated profitably when limited to carrying merchandise that came over through routes. The statutory restrictions here are no more severe than those prohibiting transportation by a railroad of its own commodities. Such legislation was sustained by the Supreme Court in Del. Lack. & West. R. R. v. United States, 231 U. S. 363. See also Assigned Car Cases, 274 U. S. 564, 575.

The order granting a preliminary injunction is reversed and the appeal from the part of the order denying the motion to dismiss the bill of complaint is dismissed.

[fol. 48a] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Central Vermont Transportation Company, Complainant-Appellee, against Harry M. Durning, Collector of the Port of New York, Defendant-Appellant. Opinion. Augustus N. Hand, C. J.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of June, one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

CENTRAL VERMONT TRANSPORTATION COMPANY, Plaintiff-Appellee,

vs.

HARRY M. DURNING, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the

Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be, and it hereby is, reversed with costs as to the part granting a preliminary injunction, and the appeal from the part of the order denying the motion to dismiss the bill of complaint is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Central Vermont Transportation Co. vs. Harry M. Durning as Collector, etc. Order for Mandate. United States Circuit Court of Appeals. Filed June 18, 1934. William Parkin, Clerk, Second Circuit.

[fol. 51] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 50, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Central Vermont Transportation Co., Plaintiff-Appellee, against Harry M. Durning, as Collector, etc., Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of July, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,875. U. S. Circuit Court of Appeals, Second Circuit. Term No. 247. Central Vermont Transportation Company, Petitioner, vs. Harry M. Durning, Collector of Customs at the Port of New York. Petition for a writ of certiorari and exhibit thereto. Filed August 2, 1934. File No. 247, O. T., 1934.